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UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In re	Bankruptcy Case Nos.:
15005 NW CORNELL LLC, and	19-31883-dwh11 (Lead Case)
VAHAN M. DINIHANIAN, JR.	19-31886-dwh11
Debtors.[1]	Jointly Administered Under Case No. 19-31883-dwh11
	DEBTORS' RESPONSE TO CREDITORS' OBJECTIONS TO DEBTORS' JOINT MOTION TO OBTAIN CREDIT

Debtor and debtor-in-possession 15005 NW Cornell LLC ("**Cornell**") and debtor and debtor-in-possession Vahan M. Dinihanian Jr. ("**Mr. Dinihanian**, and together with Cornell, the "**Debtors**") hereby respectfully respond to the objection (the "**Logan Parties' Objection**" [Dkt. 293]) filed by creditor Lillian Logan and interested parties Cornell Rd LLC, Alexander LLC, and Christiana LLC

[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: 15005 NW Cornell LLC (5523) and Vahan M. Dinihanian, Jr. (0871).

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(collectively the "**Logan Parties**") to Debtors' Joint Motion to Obtain Credit (the "**Motion**" [Dkt. 288]). Debtors further respectfully respond to the objection (the "**Trust Objection**," [Dkt. 294] and together with the Logan Parties' Objection the "**Objections**") filed by creditor Tasha Teherani-Ami, in her capacity as the trustee of the Sonja Dinihanian GST Trust DTS 1/1/11 (the "**Trust**") to the Motion.

I. RESPONSE TO THE LOGAN PARTIES' OBJECTION

A. Mr. Dinihanian has made proper disclosures.

As previously discussed during the earlier proceedings regarding motions to dismiss filed by Tasha Teherani-Ami, in her personal capacity, and in her capacity as trustee of the Sonja Dinihanian Trust, Mr. Dinihanian has made the proper disclosures in this case. Mr. Dinihanian previously testified about these issues, and the reasons for the perceived non-disclosures alleged by Ms. Teherani-Ami and the Trust. See Declaration of Vahan M. Dinihanian, Dkt. 254. Mr. Dinihanian also testified about these matters at the hearing held on July 17, 2020. The Objections simply ignore Mr. Dinihanian's testimony, and accuse Mr. Dinihanian of wrongdoing and non-disclosure at the same time he has proposed a plan to pay all of his creditors in full.

In his earlier testimony, Mr. Dinihanian explained why certain information is not required to be reported in his schedules or monthly operating reports in the exact manner that the creditors allege. For example, Mr. Dinihanian explained why he did not report the sale of a motorcycle in his monthly operating reports. That explanation was: 1) the motorcycle was purchased with funds belonging to Eagle Holdings, LLC, 2) it is the ordinary course of Eagle Holdings' business to purchase vintage motorcycles, restore and repair such motorcycles, and 3) sell those motorcycles at a profit. Mr. Dinihanian testified that is what was done in this case—he sold a motorcycle in the ordinary course of Eagle Holdings' business operations, and deposited the funds in Eagle Holdings' account. There is nothing remarkable or problematic about engaging in an ordinary course transaction, and the Court should reject the creditors' continued complaints on the subject.

Mr. Dinihanian also testified that he runs his business operations through Eagle Holdings, and that he has conducted himself in that manner for years. This includes Mr. Dinihanian's property

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management activities for which Eagle Holdings is compensated. The Logan Parties claim that Mr. Dinihanian failed to disclose income from Norris &Stevens, but the evidence submitted by the Logan Parties shows that Norris & Stevens writes checks to Eagle Holdings, LLC. See Exhibit 5, at p. 19. This is entirely consistent with Mr. Dinihanian's earlier testimony, and explains why the income was not deposited into Mr. Dinihanian's Debtor in Possession account, and also why the income does not show up on Mr. Dinihanian's monthly operating report—because the money was paid to Eagle Holdings.

Mr. Dinihanian has fulfilled his duties of disclosure in his schedules and statement of financial affairs, and his Rule 2015 operating reports. Mr. Dinihanian admitted in his testimony that he inadvertently failed to disclose a 50% tenant in common interest in a family cabin in Welches, Oregon. That omission has been cured through the filing of amended schedules. As a result, the Objections made regarding Mr. Dinihanian's disclosures and compliance with the Bankruptcy Code and Rules is not well founded, and should be overruled.

B. The proposed financing is authorized by the Tenancy Agreement.

The Logan Parties erroneously claim that the Tenancy Agreement prohibits Cornell from encumbering its interest in the Cornell Property. The Logan Parties point to Section 10 of the Tenancy Agreement to argue against the proposed financing. However, the Logan Parties apparently overlook or ignore the clear language of Section 8 of the Tenancy Agreement, which authorizes each of the owners to encumber their own interests in the Cornell Property:

> 8. Encumbrances. Each Owner shall have the right to encumber its undivided interest in the Property without the approval of any person and shall discharge the obligation secured by the encumbrance in accordance with its terms.

Declaration of Daniel Steinberg in Support of Objection [Dkt 296], Ex. 3, p. 3.

The Debtors' financing motion proposes to encumber only Cornell's interest in the Cornell Property, not the Cornell Property itself. As a result, the proposed financing transaction is clearly allowed by Section 8 of the Tenancy Agreement. The language of Section 10 applies only to an owner's

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sale of the interest, which is not implicated by the financing motion or the Debtors' Plan. The Logan Parties' objection should be overruled.

C. The Debtors will provide further loan terms.

Debtors have refined the loan terms with SORFI, and will supplement the record with additional information that should more than satisfy the issues raised in the Objections.

D. The Debtors will further information about SORFI.

As with the loan terms, Debtors will supplement the record with additional information about SORFI, and the nature of its affiliation with Paul Brenneke and Sortis

E. The Debtors have a demonstrated need for the proposed financing.

Section 364(c) authorizes the Debtor in Possession to obtain secured financing if unsecured financing cannot be obtained. Debtors have submitted evidence to demonstrate that they have consulted with other potential lenders, none of whom were able to offer financing on terms equal to the terms proposed by SORFI, LLC. Dkt. 290, at ¶¶ 12, 15. Debtors need funding to pay off their debts and eliminate the threat of foreclosure of the Cornell Property—an asset which has a value that far exceeds the amount of debt it secures. Id. at ¶¶ 6, 7, 11. Debtors have determined that the proposed financing is in the best interest of the two estates. Id. at ¶ 16. Based on the evidence, the Debtors' financing motion should be approved.

F. The Debtors are not obligated to accept financing with Logan.

The Logan Parties argue that the Financing Motion is premature, and that other parties should be allowed to propose financing terms. In the event other parties propose alternative financing terms, the Debtors can evaluate those terms and, if such terms are preferable to the terms offered by SORFI, the Debtors can bring those terms to the Court. However, preferable alternative terms have not been proposed by the Logan Parties or anyone else. Thus, the Logan Parties' objection is disingenuous, and should be rejected.

G. The Logan Parties are not entitled marshalling.

The Logan Parties provide no authority for the proposition that they are entitled to marshalling of

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assets in connection with the proposed financing. Section 364 contains no such requirement. The Logan Parties apparently misunderstand that the Debtors are seeking only to encumber Cornell's *interest* in the Cornell Property, not the Cornell Property itself. As with its other objections, the Logan Parties' request for marshalling should be overruled.

II. RESPONSE TO THE TRUST OBJECTION

A. The Trust's arguments about the need to assume multiple executory contracts are wrong, and irrelevant to the financing motion.

The Trust erroneously argues that the financing motion cannot be approved unless the Debtors assume a variety of executory contracts. The Trust fails to understand that the Tenancy Agreement is not an executory contract. The Trust also fails to understand that Mr. Dinihanian's capacity as a manager is intact even if the Cornell operating agreement is an executory contract, and even if the contract is rejected.

1. The Tenancy Agreement is not an executory contract.

An executory contract is one on which performance is due to some extent on both sides.... [I]n executory contracts the obligations of both parties are so far unperformed that the failure of either party to complete performance would constitute a material breach and thus excuse the performance of the other. *In re Texscan Corp.*, 976 F.2d 1269, 1272 (9th Cir. 1992); *citing Marcus & Millichap Inc. v. Munple, Ltd (In re Munple)*, 868 F.2d 1129, 1130 (9th Cir.1989). "The time for testing whether there are material unperformed obligations on both sides is when the bankruptcy petition is filed." *Glosser v. Maysville Reg'l Water Dist.*, 174 Fed. Appx. 34, 36 (3d Cir. March 9, 2009) (*quoting In re Columbia Gas Sys. Inc.*, 50 F.3d 233, 240 (3d Cir. 1995).

"[A]lmost all agreements to some degree involve unperformed obligations on either side," but not all agreement are executory contracts. *Gouveia v. Tazbir*, 37 F.3d 295, 299 (7th Cir. 1994). For example, in the *Gouveia* case, the Seventh Circuit ruled that real property restrictive covenants "do not fall within the purview of § 365 because they grant a present right of enjoyment, are traditionally treated as running with the land and are often recorded "on the title of the encumbered property." *Id.* The

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Ninth Circuit Bankruptcy Appellate Panel (BAP) agreed with the Seventh Circuit's reasoning in *Gouveia v. Tazbir*, in which the court held that restrictive covenants were not "executory contracts" under § 365, even where they required the debtors to perform a number of duties, and required nondebtor landowners to keep their boats insured and abide by certain bylaws (all of which the court seemed to view as *de minimis* obligations). *In re Hayes*, No. ADV.07-00045-RBK, 2008 WL 8444812, at *11 (B.A.P. 9th Cir. Mar. 31, 2008).

The Tenancy Agreement is not an executory contract, as it acts much like the restrictive covenants examined in the *Gouveia* and *Hayes* cases. While it is true that each of the owners are bound to perform certain duties under the Tenancy Agreement, the agreement itself does not fit the definition of having duties that are materially underperformed.

2. Mr. Dinihanian is Cornell's manager, and would remain the manager even if the operating agreement is rejected.

The Trust's argument regarding the Cornell operating agreement is misplaced, because it fails to recognize that Mr. Dinihanian would remain the manager of the LLC even if the operating agreement was rejected. In the absence of an operating agreement, Oregon limited liability companies are governed by the default provisions in ORS Chapter 63. See ORS 63.130 (describing default rules in the absence of an operating agreement). Oregon law provides that a manager remains a manager unless removed. ORS 63.140(2)(c)(B). Thus, even if it were rejected, Mr. Dinihanian would remain the manager, and would have the authority vested in him as a manager under ORS Chapter 63. Therefore, the question of whether the operating agreement is an executory contract is largely academic, and is of no consequence as to whether the financing motion should be approved. As a result, the Trust's objection should be overruled.

B. The Trust fails to understand the interplay between the Bankruptcy Code and the state court judgments.

The Trust continues to argue, without citation to any authority, that a plan cannot be viable unless it will transfer half of Cornell's interest in the Cornell Property. The Trust is wrong again, as it fails to understand the interplay between the Bankruptcy Code and the requirement to give Full Faith

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and Credit to state court judgments.

The interaction between the Bankruptcy Code and the Full Faith and Credit statute was examined in the case of *In re Keller*, 157 B.R. 680, 684 (Bankr. E.D. Wash. 1993). In *Keller*, the bankruptcy court acknowledged that the Full Faith and Credit statute (28 U.S.C. § 17388) obligates the federal courts to afford full faith and credit to state court judgments, but rejected a creditor's argument that its claim could not be impaired by the debtor's plan:

> Creditor argues that because the Settlement is incorporated into the state court divorce decree, the full faith and credit clause of the Constitution prevents this court from modifying the contractual language of the Settlement. Creditor asserts that any action to impair her contractual rights under the divorce decree is beyond the authority of this court.
>
> Creditor's argument misinterprets the interaction between the Bankruptcy Code and a valid state court judgment. Title 28 U.S.C. 17388 obligates the federal courts to afford full faith and credit to state court judgments. The full faith and credit clause makes a judgment res judicata concerning matters that have already been fully litigated, and precludes another forum from relitigating the same matter. Here, the Plan does not attempt to relitigate the Settlement, nor does it dispute the character or existence of the debt.
>
> As a result of the state court judgment, Creditor has a claim against Debtor. Under § 1123(b) a debtor's plan may "impair or leave unimpaired any class of claims, secured or unsecured."
>
> A plan provision which does not seek to relitigate a claim based on a state court judgment but only impairs that claim via its treatment in the plan does not involve, and therefore does not violate, the full faith and credit clause.

Id. at 684–85. Although the *Keller* case is not binding authority, its logic persuasively demonstrates that the Trust's reliance on the Full Faith and Credit statute is misplaced.

Debtors acknowledge that their Plan will likely go further than just impairing the Trust's claim, as Cornell has already initiated an adversary proceeding to avoid its obligation to the Trust under § 544. As a result, the avoidance action does seek to modify the Divorce Judgment, but in a permissible way.

A strikingly similar case was addressed by the Bankruptcy Appellate Panel for the Sixth Circuit

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in the case of *In re Dirks*, 2009 WL 103606 (B.A.P. 6th Cir. 2009). In *Dirks*, the court examined whether avoidance actions could be filed to attack a divorce settlement that had been reduced to a judgment. The Dirks court acknowledged that the Full Faith and Credit statute requires federal courts to give state court judgments the same preclusive effect they would be given by the rendering state. *Id*. at *4. However, the court concluded the judgment was not entitled to preclusive effect because the matters in dispute were not actually litigated—they were settled. *Id*. Additionally, even if the judgment was rendered after full litigation on the merits, the issues litigated to divide martial assets under state law are different from the issues presented when examining avoidance actions under the Bankruptcy Code. *Id*.

While the bankruptcy trustee ultimately lost his avoidance action in the *Dirks* case, the decision was based on an analysis of the elements of § 547, not the Full Faith and Credit statute. *Id*. Again, while not binding authority, the *Dirks* decision clearly sets forth the analysis when examining the interplay between state court judgments and the Bankruptcy Code. The Court should reject the Trust's misplaced reliance on the Full Faith and Credit statute.

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III. CONCLUSION

For the foregoing reasons, the Debtors respectfully request that the Court overrule the Objections and grant the Motion.

Dated: September 22, 2020

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth below, they caused the foregoing document to be served on the parties listed on the respective attached service list via the CM/ECF filing system.

Dated: September 22, 2020

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